Power Root (M) Sdn Bhd & Ors v Director General of Customs

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1(2)-25–288 OF 2009
ZALEHA YUSOF J
23 JULY 2013

Revenue Law — Sales tax — Refund — Refund of illegally collected tax — Whether customs department bound to return ultra vires tax collected from companies despite absence of court order directing refund to be made — Whether department's refusal to make refund unjust and breached constitutional principles — Whether argument that sales tax had been 'passed on' to customers of companies did not relieve department of obligation to make restitution

The applicants manufactured certain drinks ('the goods') which the respondent classified as attracting a sales tax of 10%. The applicants were of the view the goods were only liable to a 5% sales tax. However, in view of the respondent's decision, the applicants paid the sales tax at the rate of 10% and then appealed against the respondent's decision to the Customs Appeal Tribunal which dismissed their appeal. The applicants then appealed to the High Court which found in their favour. The Court of Appeal unanimously dismissed the respondent's appeal against the High Court's decision. The applicants wrote to the respondent requesting for the extra 5% sales tax it had collected to be refunded to them. The respondent refused the request saying there was no order of court directing the refund to be made. The applicants filed encl 20 in the instant proceedings for consequential relief to give effect to the orders made by the High Court and the Court of Appeal. The respondent filed encl 28 to have the proceedings converted into a writ action. Inter alia, the respondent argued that the sales tax paid by the applicants had been 'passed on' to their customers and therefore if a refund was made the applicants would be unjustly enriched.

Held, allowing encl 20 and dismissing encl 28:

(1) In the light of the Court of Appeal's order, it was an abuse of process by the respondent to refuse to refund to the applicants the additional 5% sales tax it had illegally collected. It was an injustice to the applicants and a breach of fundamental constitutional principles to permit the respondent to retain the illegally collected taxes (see paras 20–21).

(2) Order 92 r 4 of the Rules of Court 2012 conferred on the High Court inherent powers to make consequential orders to prevent injustice. The

court was not functus officio as far as encl 20 was concerned but was indeed functus officio with regard to encl 28 (see paras 21 & 24).

(3) The respondent's assertion that it was relieved of its obligation to make restitution because the illegally collected taxes had been 'passed on' to the end users was unfounded. The respondent had no right to retain illegally collected taxes and the applicants should have recourse to restitution as of right. The defence of 'passing on' was rejected because it was inconsistent with the basic premise of restitution law; it was economically misconceived; and the task of determining the ultimate burden of tax was exceedingly difficult and constituted an inappropriate basis for denying relief (see paras 29–30).

(4) The court had no jurisdiction to convert the originating motion, let alone an interlocutory application such as encl 20, into a writ of summons. It was clear that when the matter was disposed of at the High Court and at the Court of Appeal there was no longer any cause or matter to be converted into a writ (see para 17).

[Bahasa Malaysia summary

Pemohon-pemohon mengilang air tertentu ('barangan') yang mana diklasifikasikan oleh responden sebagai menarik cukai jualan sebanyak 10%. Pemohon-pemohon berpendapat bahawa barangan tersebut boleh dikenakan cukai jualan 5% sahaja. Walau bagaimanapun, memandangkan keputusan responden, pemohon-pemohon membayar cukai jualan pada kadar 10% dan kemudiannnya merayu terhadap keputusan responden kepada Tribunal Rayuan Kastam yang mana menolak rayuan mereka. Pemohon-pemohon kemudian merayu kepada Mahkamah Tinggi yang memihak mereka. Mahkamah Rayuan sebulat suara menolak rayuan responden terhadap keputusan Mahkamah Tinggi tersebut. Pemohon-pemohon menulis kepada responden memohon untuk cukai jualan yang lebih sebanyak 5% yang dikutipnya dibayar balik kepada mereka. Responden menolak permohonan tersebut dengan menyatakan tidak terdapat perintah mahkamah mengarahkan bayaran balik dibuat. Pemohon-pemohon memfailkan lampiran 20 dalam prosiding ini untuk relief penting untuk memberi kesan kepada perintah-perintah yang dibuat oleh Mahkamah Tinggi dan Mahkamah Rayuan. Responden memfailkan lampiran 28 untuk membuatkan prosiding tersebut diganti kepada tindakan writ. Responden, antara lain, berhujah bahawa cukai jualan yang dibayar oleh pemohon-pemohon telah 'passed on' kepada pelanggan-pelanggan mereka dan oleh itu jika bayaran balik dibuat pemohon-pemohon akan mendapat pengkayaan yang tidak patut.

Diputuskan, membenarkan lampiran 20 dan menolak lampiran 28:

(1) Berdasarkan perintah Mahkamah Rayuan, ia adalah penyalahgunaan proses oleh responden untuk menolak daripada membayar balik kepada

pemohon-pemohon cukai jualan lebihan sebanyak 5% yang dikutip secara tidak sah. Ia merupakan ketidakadilan kepada pemohon dan melanggar prinsip-prinsip asas perlembagaan untuk membenarkan responden untuk mengekalkan cukai yang dikumpul secara haram yang (lihat perenggan 20–21).

(2) Aturan 92 k 4 Kaedah-Kaedah Mahkamah 2012 memberikan Mahkamah Tinggi kuasa inherens untuk membuat perintah-perintah penting untuk menghalang ketidakadilan. Mahkamah bukan *functus officio* setakat berkaitan lampiran 20 tetapi sememangnya *functus officio* berkaitan lampiran 28 (lihat perenggan 21 & 24).

(3) Hujahan responden bahawa ia telah dilepaskan daripada tanggungjawabnya untuk membuat restitusi kerana cukai yang dikutip secara haram telah 'passed on' kepada pengguna adalah tidak berasas. Responden tidak berhak untuk menahan cukai yang dikutip secara haram dan pemohon-pemohon patut memilih kepada restitusi sebagai hak. Pembelaan 'passing on' ditolak kerana ia tidak konsisten dengan asas yang berdasarkan undang-undang restitusi; ia disalah tanggap secara ekonomi; dan tugas menentukan beban muktamad cukai adalah sangat sukar dan merupakan asas yang tidak sesuai untuk menafikan relief (lihat perenggan 29–30).

(4) Mahkamah Tidak mempunyai bidang kuasa untuk menukarkan usul pemula tersebut, lebih-lebih lagi permohonan interlokutori seperti lampiran 20, kepada writ saman. Adalah jelas bahawa apabila perkara didengar di Mahkamah Tinggi dan di Mahkamah Rayuan tiada lagi apa-apa sebab atau perkara untuk diganti kepada writ (lihat perenggan 17).]

Cases referred to

Abdul Rashid bin Maidin & Ors v Lian Mong Yee [2008] 1 MLJ 469; [2008] 1 CLJ 1, CA (refd)

Ezzen Heights Sdn Bhd v Ikhlas Abadi Sdn Bhd (Soh Yuh Mian, intervener) [2011] 4 MLJ 173, CA (refd)

Hashim bin Hj Jasin v Pegawai Pengurus Pilihanraya Mohd Daud bin Abdul Hamid & Ors [2008] 8 MLJ 402, HC (refd)

Kingstreet Investment Ltd and another v New Brunswick (Department of Finance and Another) [2007] 9 ITLR 591; [2007] 276 DLR (4th) 342, SC (folld)

Majlis Agama Islam Selangor v Bong Boon Chuen & Ors [2009] 6 MLJ 307; [2009] 6 CLJ 405, FC (refd)

Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors [1988] 1 MLJ 178, SC (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2) [2010] 2 MLJ 181; [2010] 1 CLJ 429, FC (refd)

Tan Guek Tian & Anor v Tan Kim Kiat @ Chua Kim Kiat (Part 2) [2007] 6 MLJ 260, HC (refd)

Legislation referred to

Federal Constitution art 96
Rules of Court 2012 O 28 r 8, O 92 r 4
Sales Tax Act 1972 ss 6, 12(a), 32

Saravana Kumar a/l Segaran (Lydia Tong Yui Shyian-Shyian with him) (Lee Hishammuddin Allen & Gledhill) for the appellant.
Azamuddin bin Abd Aziz (Senior Federal Counsel, Royal Malaysian Customs Department) for the respondent.

Zaleha Yusof J:

[1] The applicants are manufacturers of the following drinks:

(a) Alicafe Premium Gold with Oligofructose;

(b) Extra Honey Tongkat Ali;

(c) Ginseng Tongkat Ali;

(d) Honey Dates Tongkat Ali;

(e) Per'l Kacip Fatimah;

(f) Alicafe with Tongkat Ali;

(g) Per'l Cafe Kacip Fatimah;

(h) Alicafe with Ginseng; and

(i) Carbonated Nnergy

[2] The drinks were classified by the applicants as follows, which pursuant to Sales Tax Order (Tax Rates No 2) 2008 attracted sales tax of 5%:

(a) Alicafe Premium Gold with Oligofructose, Alicafe with Tongkat Ali, Perl Cafe Kacip Fatimah, Alicafe with Ginseng ('the four items') be classified as 'preparation with a basis of extracts, essences or concentrates or with a basis of coffee' under heading 2101.12.900 of the First Schedule to the Customs Duties Order 2007;

(b) Extra Honey Tongkat Ali, Ginseng Tongkat Ali, Honey Dates Tongkat Ali, Per'l Kacip Fatimah, and Carbonated Nnergy be classified as 'Juice of any other single fruit or vegetable' under heading 2009.80.919 of the First Schedule of the Customs Duties Order 2007.

[3] However, the respondent, pursuant to a custom audit, had classified the

above drinks as 'other non-alcoholic beverages' under heading 2202.90.900 which according to the First Schedule of the Customs Duties Order 2007 attracted sales tax of 10%. Accordingly, the respondent imposed sales tax of 10% on the applicants in respect of the above drinks.

[4] Consequent to the decision of the respondent, the applicants, namely Power Root (M) Sdn Bhd and Power Root Manufacturing Sdn Bhd had made additional sales tax payment in respect of the four items, which is as follows:

i.	Power Root (M) Sdn Bhd	RM732,936.05
ii.	Power Root Manufacturing Sdn Bhd	RM123,663.78
		RM856,599.83

[5] The applicants being unhappy with the respondent's decision appealed against the respondent's decision to the Custom Appeal Tribunal but the applicants' appeal was dismissed. Aggrieved, the applicants appealed to this court in respect of the sales tax of the Four Items and this court had on 24 June 2010 allowed the applicants appeal. Dissatisfied, the respondent filed an appeal to the Court of Appeal on 22 July 2010. The Court of Appeal on 2 April 2012 unanimously dismissed the respondent's appeal with costs.

[6] As a result of the decision of the Court of Appeal, the applicant had on 11 May 2012, written to the respondent and requested for the return of the 5% being the sales tax paid by the applicants in respect of the four items which had previously subjected to a sales tax of 10%. The respondent had on 27 June 2012 replied and stated that the request for refund of the taxes previously paid could not be considered as there is no order of court which states that the 5% tax paid by the applicants should be refunded to them. As a result, the applicants filed encl 20 for consequential order to give effect to the High Court order dated 24 June 2010 and the Court of Appeal order dated 2 April 2012. The respondent filed encl 28 in response to encl 20 in order to continue the proceedings as if begun by writ of summons.

PRESENT APPLICATION

[7] Before me now are the two applications in encls 20 and 28, filed by the applicants and the respondent respectively.

THE APPLICANTS' CASE

[8] The applicants contend that encl 20 is for consequential orders in order

that the High Court order dated 24 June 2010 which was affirmed by the Court of Appeal on 2 April 2012 are given full effect. The applicants further contend that this court has inherent power to make consequential order to prevent injustice under O 92 r 4 of the Rules of Court 2012 and refer to the Federal Court's decision in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 2)* [2010] 2 MLJ 181; [2010] 1 CLJ 429, Court of Appeal in *Ezzen Heights Sdn Bhd v Ikhlas Abadi Sdn Bhd (Soh Yuh Mian, intervener)* [2011] 4 MLJ 173. Hence the question that the court is functus officio to grant consequential orders as in the contention of the respondent, does not arise.

[9] The applicants further contend that it was never in dispute that they had already paid the said sums of 10% sales tax and under s 12(a) to be read with s 6 of the Sales Tax Act 1972 ('Act 64') the applicants are the manufacturer and are the one who are being charged with the tax. As the Court of Appeal had declared that the respondent had erred in imposing a tax rate of 10% instead of 5%, the imposition of the said rate by the respondent was ultra vires and illegally collected. Hence it is the applicants' contention that the respondent will be unjustly enriched if they were permitted to retain the ultra vires tax.

[10] On encl 28, the applicant argues that it is procedurally defective as the order cited in the application is O 92 r 4 instead of O 28 r 8 of the Rules of Court 2012. Order 28 r 8 of the Rules of Court 2012 ('ROC') provides for the conversion of an originating summons to a writ. It cannot be disputed that the main proceedings, ie the originating motion before this court has been fully disposed. The applicants' application here is merely an interiocutory application for consequentiai orders and not an originating mode of commencement. Thus, the applicants argue, there is no longer any 'cause or matter begun by originating summons' to be converted into a writ.

THE RESPONDENT'S CASE

[11] On encl 20, the respondent contends that the issue of refund was never raised or pleaded during the appeal and the issue was not dealt with before. There was no witnesses being called or submission made in the proceedings before the Custom Appeal Tribunal. Hence the applicant cannot raise the issue now as the court is already functus officio as the court already decided on the appeal. Further the respondent argues, the court order was not retrospective in nature. Therefore the 5% rate was only effective from the date of the High Court's decision.

[12] On encl 28, the respondent contends that the sales tax is charged to the end users and not the applicant. The applicant in their affidavit had not shown that the payment was made out of their pocket. To refund the money would unjustly enrich the applicants and it is the duty of the respondent under s 32 of

Act 64 to disallow such from happening.

ISSUE

[13] Whether this court is functus officio.

[14] Whether the applicant is entitled for the refund.

DECISION

Whether this court is functus officio

[15] To me, this issue can be divided into two sub-issues ie first, whether this court is functus officio to hear and decide on encl 20 ie the application for consequential order and secondly whether this court is functus officio to hear and decide on encl 28 ie the application to convert the originating motion into a writ.

[16] One of the authorities cited by learned senior federal counsel for the respondent in opposing encl 28 on the ground that this court is functus officio is *Abdul Rashid bin Maidin & Ors v Lian Mong Yee* [2008] 1 MLJ 469; [2008] 1 CLJ 1, which was also quoted by learned counsel for the applicants. It was the decision of the Court of Appeal, in particular the foliowing passage:

> It is trite law that after a judge has made a final order which has been perfected, he is functus officio and has no jurisdiction to amend, or vary his order or re-hear the issues, save under the slip rule or where the order can be said to be a nullity. (See the case of *Gai Hin Refrigeration Sdn Bhd v Kamanis Holdings Sdn Bhd* [2005] 1 MLJ 57; [2004] 4 CLJ 232). Furthermore … an action filed by way of an originating summons is an originating process, while a summons-in-chambers is a subsidiary process which draws its life from the originating process. In the context of the present case, when the originating process was fully heard and finally disposed, of *the cause of action was extinguished* and no further application of a fresh and substantial nature might be made by the plaintiffs by way of a summons-in-chambers save those specifically permitted or directed by the original orders of the court. (See *Hengwell Development Pte Ltd*. It was equally clear that the High Court would in *any event have no jurisdiction to order the conversion of the OS into a writ action after the OS had been finally disposed of and the appeal against the order of the High Court also finally disposed of by the Court of Appeal.*
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> (Emphasis added.)

[17] To me, the above quotation supports the applicants' contention in supporting encl 20 and in opposing encl 28. This is because, the case clearly shows that when the matter was disposed of by this court and at the Court of Appeal, there is no longer any cause or matter to be converted into writ.

Therefore, the court has no jurisdiction to convert the originating motions, let alone an interlocutory application such as encl 20, into a writ of summons.

[18] Further in their original appeal before the High Court, one of the prayers sought by the applicants was 'for other and further relief that the court deems fit and proper'. It is not disputed that the applicants had already paid the respondent the 10% sales tax. Pursuant to the High Court order dated 24 June 2010 (which was affirmed by the Court of Appeal); it was declared that the respondent had erred in imposing a tax rate of 10% instead of 5% on the applicants' products. Therefore, I agree with the applicant that the imposition of such by the respondent was ultra vires and illegally collected.

[19] In *Kingstreet Investment Ltd and another v New Brunswick (Department of Finance and Another)* [2007] 9 ITLR 591, it was held by the Supreme Court of Canada that:

> (1) To permit the Crown to retain an ultra vires tax would condone a breach of the fundamental constitutional principle that the Crown could not levy a lax except with authority of the Parliament or the legislature. Hence, a citizen who made a payment pursuant, to ultra vires legislation had a right to restitution. The Restitutionary claim was based not on unjust enrichment but was a public law claim based on constitutional principle (see paras [12], [15], [24], [38], [39], [40], post). *Amax Potash Ltd v Govt of Saskatchewan* [1977] 2 SCR 576 applied. *Air Canada v British Columbia* [1989] 1 SCR 1161 and *Woolwich Equitable Building Society v IRC* [1993] AC 70 considered.
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> (2) The risk of fiscal disruption and reopening of past transactions was outweighed by the principle of legality and was ameliorated by the possibility of suspended invalidity orders and retroactive legislation. It was for Parliament, not the courts, to decide what restrictions to place on the right to restitution (see paras [3], [28]-[30], post).
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> (3) The defence of passing on was to be rejected. It was economically misconceived and raised serious problems of proof. It was not an appropriate defence to a claim in restitution since restitution was not based on compensation for loss (see paras [46] – [49], post). *Comr of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 and *British Columbia v Canadian Forest Products Ltd* [2004] 2 SCR 74 considered.
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> (4) The doctrine of protest and compulsion was not applicable to cases based on the constitutional principle that the Crown should not be able to retain taxes that lack legal authority. It mattered little whether the taxpayer paid under protest and compulsion. Once the law was proved to be invalid, there was be no burden on the taxpayer to prove that it paid under protest. There could also be no difference between the different parties subjected to an unlawful tax (see paras [52], [53], [55], [56], post). *Woolwich Equitable Building Society v IRC* [1993] AC 70 considered.

[20] Therefore it is my opinion that it is a breach of constitutional principle

to permit the respondent to retain ultra vires tax. In light of the decision of the Court of Appeal affirming the High Court order and the undisputed fact that the applicants had overpaid the sales tax based on the impugned decision of the respondent, the respondent should rightfully return the additional 5% sales tax on the four items amounting to RM856,599.83. It is an abuse of process by the respondent to refuse to refund the additional sales tax to the applicants in light of the Court of Appeal order dated 2 April 2012.

[21] I am also of the view that to allow the respondent to retain the additional 5% sales tax would create injustice to the applicants. Order 92 r 4 of the ROC confers on the High Court inherent powers to make consequential orders to prevent injustice. In *Ezzen Heights Sdn Bhd v Ikhlas Abadi Sdn Bhd (Soh Yuh Mian, intervener)*'s case, the Court of Appeal held at para 39:

> Order 92 r 4 confers on the High Court and, by virtue of r 4 of the Rules of the Court of Appeal 1994, on this court, inherent powers eg, to make consequential orders to prevent injustice.

[22] The Federal Court in *Takako Sakao*'s case had also held that the court had ample jurisdiction to make consequential orders to give effect to its judgment.

[23] The respondent's argument that the issue of refund cannot be raised now as it was never raised in the appeal proceedings before is, with respect, in my opinion, misconceived. This is because the fact that the applicants had paid that amount was never in dispute. Parties were very clear as to the amount of sales tax to be paid. The only contention was whether it was at the rate of 5% or 10%. The applicants had already paid the sums of sales tax in protest when they filed the Form CJP No1 which was submitted together with all the necessary documentation. The receipt was printed on the form CJP No 1 ('exh TMAB 12 and 13'). These payments were accepted by the respondent in 2008, 2009 and 2010 and not questioned until now. If the respondent had so readily accepted payment based on the documentation then, they must also accept that the return of the taxes paid to be calculated based on the very same documentation. To deny the applicants a return of the taxes paid in my opinion, will cause grave injustice to the applicants.

[24] Based on the above, I am of the view that the court is not functus officio as far as encl 20 is concerned but is indeed functus officio as far as encl 28 is concerned.

Whether the applicants are entitled for a refund

[25] In answer to the respondent's contention that the sales tax are charged to the end users and not the applicants, I agree with the applicants that pursuant to s 6 of the Act 64:

Subject to this Act, sales tax shall be charge and levied on all taxable goods — A

(a) manufactured in Malaysia

and

s 12(a) of the Sales Tax Act 1972 defines a taxable person as: B

any taxable person who carries on a business in Malaysia … in respect of taxable goods manufactured by him in the course of such business.

[26] Sales tax is charged on the manufacturer, which are the applicants. The respondent alleges that the sales tax overpaid by the applicants was 'passed on' to the consumers and therefore if they were to refund the sums to the applicants, the applicants would be unjustly enriched. C

[27] To me, on the contrary, it is the respondent who will be unjustly enriched if they were permitted to retain the ultra vires tax. Once the law is declared ultra vires, the respondent has no right to retain such taxes collected. Article 96 of the Federal Constitution of Malaysia states that: D

96 No tax or rate shall be levied by or for the purposes of the Federation except, by or under the authority of federal law. E

[28] In rejecting the passing-on defence, the Supreme Court of Canada in *Kingstreet Investment Ltd*'s case which was also repeated in [2007] 276 DLR (4th) 342, had this to say at the following paras: F

[42] Robertson JA found that the only possible defence the Province could raise in the present case was that the appellants had passed on the cost of the charge (paras 46 to 48). The basic premise of the passing-on defence is that if the taxpayer has passed on the burden of the tax payments to others, usually via price increases charged to its customers, the taxpayer has not suffered a deprivation, the taxing authority's enrichment was not. at its expense, and it. would receive a windfall if it were awarded recovery. *However, unlike Robertson JA, I would reject the passing-on defence in the context of the recovery of taxes paid pursuant to ultra vires legislation.* G

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[44] There are three major criticisms of the passing-on defence: first, that it is inconsistent with the basic premise of restitution law; second, that it is economically misconceived; and third, that the task of determining the ultimate location of the burden of a tax is exceedingly difficult and constitutes an inappropriate basis for denying relief. I

…

[46] It is on this same basis that the Australian High Court refused to recognize the defence in *Comr of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51. Brennan J explained (at 90–91) that:

A … The fact that Royal had passed on to its policy holders the burden of the payments made to the Commissioner does not mean that Royal did. not pay its own money to the Commissioner. *The passing on of the burden of the payments made does not affect the situation that, as between the Commissioner and Royal, the former was enriched at the expense of the latter.* It may be that, if Royal, recovers the overpayments it made, the policy holders will be entitled themselves to claim a refund from Royal of so much of the overpayments made by Royal to the Commissioner as represents the amount paid to Royal by the policy holder. However that may be, *no defence of 'passing on'* is available to defeat a claim for moneys paid by A acting on his own behalf to B where B has been unjustly enriched by the payment and the moneys paid had been A's moneys [footnotes omitted].

C

[48] In addition to being contrary to the basic principles of restitution law, the defence of passing on has also been criticized for being economically misconceived and for creating serious difficulties of proof In *British Columbia v Canadian Forest Products Ltd* 2004 SCC 38; [2004] 2 SCR 74, LeBel J, writing in dissent but not on this point, commented on the inherent difficulties in a commercial marketplace of proving that the loss was not passed, on to consumers. *LeBel J noted that every commercial entity could be accused of passing on all or part of any damages suffered by it, by its own rates or charges to its customer. This is because it is difficult to determine what effect a change in a company's prices will have on its total sales. Unless the elasticity of demand is very low, the plaintiff is bound to suffer a loss, either because of reduced sales or because of reduced profit per sale. Where elasticity is low, and it can be demonstrated that the tax was passed on through higher prices that did not affect profits per sale or the volume of sales, it would be impossible to demonstrate that the plaintiff could not or would not have raised its prices had the tax not been imposed, thereby increasing its profits even further. LeBel J referred to these various figures as 'virtually unascertainable'* (para 205, citing White J in *Hanover Shoe, Inc v United Shoe Machinery Corp* 392 US 481 (1968) at 493). LeBel J ultimately concluded that *'[t]he passing on defence would, in effect, result in an argument that no damages are ever recoverable in commercial litigation because anyone who claimed to have suffered damages but was still solvent had obviously found a way to pass the loss on'*(para 206, citing Ground J in *Law Society of Upper Canada v Ernst & Young* (2002) 59 OR (3d) 214, at para 40).

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H *For the above reasons, I would reject the passing-on defence in its entirety.*

(Emphasis added.)

[29] The respondent's assertion that for the reason the illegally collected taxes are 'passed on' to the end users therefore relieves them of their obligation for restitution, is simply unfounded. In the first place, the respondent has no right to retain illegally collected taxes and the applicants should have recourse to restitution as of right. It would be a breach of fundamental constitutional principles to permit the respondent to retain illegally collected taxes.

I

[30] Secondly, applying *Kingstreet Investments Ltd and Another* the defence of passing on is to be rejected for three reasons,

(a) that it is inconsistent with the basic premise of restitution law;

(b) that it is economically misconceived;

(c) that the task of determining the ultimate burden of tax is exceedingly difficult and constitutes an inappropriate basis for denying relief.

Other issues

[31] Ie encl 28 is procedurally defective.

(a) In encl 28, the respondent cited O 92 r 4 of the ROC. With respect, as submitted by learned counsel for the applicant, the proper procedure for conversion is expressly provided under O 28 r 8 of the ROC;

(b) In *Permodalan MBF Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178, the Supreme Court held:

> We read this to mean that the rules cannot, interfere with the exercise of the inherent powers by the court so long as it deems it-necessary to prevent any injustice or any abuse of its own process. *It follows that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers.*
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> (Emphasis added.)

(c) In *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307; [2009] 6 CLJ 405, the Federal Court held at para 26:

> On the appellant's contention that this court can invoke its inherent jurisdiction to allow the applicant to come in as a party to the judicial proceedings in the event that the court finds *O 15 r 6(2) (b) of the RHC* to be inapplicable, I am of the view that such a contention is untenable in the circumstances of this case. There is a specific provision in *O 53 r 8(1) of the RHC*. The inherent jurisdiction of this court cannot be invoked to override the application of a specific rule. On this point in the case of *Permodalan MBf Sdn Bhd v Tan Sri Dato' Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178 ; [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244 the Supreme Court had this to say:
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> > It follows that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers. (Emphasis added.)

(d) Hence, with respect, I agree with the applicant that the respondent

cannot rely on the inherent powers of the court if the powers sought to be exercised encroaches the rules of court. In *Tan Guek Tian & Anor v Tan Kim Kiat @ Chua Kim Kiat (Part 2)* [2007] 6 MLJ 260, the court held at p 260:

> Inherent powers or jurisdiction of the court, as provided for under Order 92 rule 4 of the RC is exercised as part of administrative of justice. It is procedural in nature and is not part of substantive law.

(e) In *Hashim bin Hj Jasin v Pegawai Pengurus Pilihanraya Mohd Daud bin Abdul Hamid & Ors* [2008] 8 MLJ 402 per Zainal Adzam J at p 409:

> Inherent powers or jurisdiction of the court … is a procedural rule to prevent injustice or an abuse of the process of the court. The only mention of 'inherent jurisdiction' in law is found in O 92 r 4 of the Rules of the High Court 1980. Therein lies its limitation, viz it cannot be a part of substantive law. To go beyond that would be tantamount to the court encroaching into the power of the Legislature.

THE CONCLUSION

[32] I have perused the cause papers and submission of the parties, both written as well as oral. Based on the above, I allow the applicants' application in encl 20 and dismiss the respondent application in encl 28.

Enclosure 20 allowed and encl 28 dismissed.

Reported by Ashok Kumar